No. 85-499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

B. H. PAPASAN,
SUPERINTENDENT OF EDUCATION, *et al.*,
Petitioners,

v.

WILLIAM A. ALLAIN
GOVERNOR, STATE OF MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

ORMA R. SMITH, JR.
SMITH, ROSS & TRAPP
508 Waldron Street
Post Offfice Box 191
Corinth, Mississippi 38834
(601) 286-9931

T. H. FREELAND, III
(Counsel of Record)
T.H. FREELAND, IV
T. F. WILSON
1013 Jackson Avenue
Post Office Box 269
Oxford, Mississippi 38655
(601) 234-3414

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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SUMMARY OF ARGUMENT

The court below and the Mississippi Attorney General respondents treat this case as one primarily seeking retrospective relief from the state. But that was never the focus of the complaint, and no such claim is before this court. The issue before this court is whether state officials will be made to cease continuing annual violations of their obligations as trustees of the school lands trust in the future in conformity with governing federal law.

The school lands trust was a congressional precondition of state sovereignty, created and regulated by federal law. These binding federal obligations are, like all public trusts, enforceable by a court of equity at the behest of the beneficiaries.

Past acts in violation of this express trust by predecessors in office of respondent state officials—consisting of conversion of trust funds to the use of the state, abandonment of reversionary interests in leased trust lands, and improvident loans of trust funds—imposed on respondents a continuing duty to provide trust income commensurate with a properly managed trust. This obligation has continued to be legislatively acknowledged by the state since the wrongful acts occurred. As recently as 1985, the obligation and the fact that it was not being honored were admitted by one of the respondents who violate this acknowledged trust obligation annually.

Petitioners' claim for prospective equitable relief is not barred by the eleventh amendment. Under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its progeny, plaintiffs may obtain injunctive relief that requires the state trustees to conform their future conduct in the administration of the school lands trust to the requirements of federal law. That such prospective relief may have an inevitable effect on the state treasury is irrelevant to the eleventh amendment. Rather, prospective relief is neces-

sary and appropriate to vindicate the supremacy of federal law; any effect on the state treasury is incidental to that end.

ARGUMENT

I. The School Lands Trust Created By The Federal Land Grant Scheme Is A Binding Federal Obligation Enforceable By A Court Of Equity

The Attorney General respondents—the Governor, the Attorney General, and the Superintendent of Education—are operating under a number of misapprehensions about this action generally and about the nature of the trust claim in particular. One important misapprehension relates to the proper party defendants for this action. The Attorney General respondents suggest that "the trust . . . is administered by the legislature of the State of Mississippi. . . ." and that the legislature is the only proper defendant. (Attorney General Respondents' Brief at 18-19).[1] This is, to say the least, a peculiar idea as to which branch of government performs ministerial functions. The state officials who were made defendants include the chief executive officer of the State of Mississippi--the Governor—and the executive officers primarily charged with management and supervision of the state's education system—the State Superintendent of Education and the State Board of Education as it was then constituted. Most importantly, the defendants include the executive officers charged with management and supervision of Mississippi's federal school lands trust. (Secretary of State Respondents' Brief at 2-3). The administration of a trust is in the truest

[1] References to the brief of the Attorney General respondents are indicated by (Attorney General respondents' Brief ____). Reference to the brief of the Secretary of State Respondents, who are the Secretary of State and the Assistant Secretary of State, are indicated by (Secretary of State Respondents' Brief ____). References to the petitioners' brief are indicated by (Petitioners' Brief ____).

sense a ministerial, hence executive, function. The executive officers charged with the responsibilities of trustee are the defendants sued.

The Attorney General respondents are operating under similar confusion as to the nature of the claims stated in the complaint. They make much out of the Treaty of Pontotoc Creek, and act as if the petitioners' position depended upon an attack upon that treaty. (Attorney General Respondents' Brief at 11). This apparently underlies the Attorney General respondents' contention that the failure to reserve the sixteenth sections is somehow "[t]he crux of the allegations" of the complaint. (Attorney General Respondents' Brief at 3). While the Attorney General respondents' creative misreading of the treaty is of academic interest,[2] it has no bearing on the actual claims presented. The claims in this case--for breach of trust, breach of the contracts clause, and violation of the equal protection clause—all arise from actions by the state officials in mishandling the trust property that was given to the state in trust. Petitioners' claims are grounded in the *present* failure, *reoccurring* each year, of these trustees to honor the obligations of the trust.

Both the court below and the Attorney General respondents in their brief in this Court ignore the nature of the petitioners' federal school lands trust claim. The Attorney General respondents seem to treat the school lands trust as a mere precatory gift. On this premise, it is argued that Congress had no power to regulate sub-

[2] The two main treaties of Indian cession of the 1830's in Mississippi, the Treaty of Pontotoc Creek and the Treaty of Dancing Rabbit Creek, had essentially identical provisions directing that the lands of the cession be sold for the benefit of the Indians. Both provided for sale under applicable lands sales statutes, and thus implicitly provided for reservation of sixteenth sections. In the Pontotoc Cession, the school lands were *not* reserved, whereas in the Dancing Rabbit Creek Cession they were.

sequent alienation and waste of the trust lands and their proceeds. (Attorney General Respondents' Brief at 13-14).[3] The court below states first that all wrongful acts occurred one hundred and thirty years ago, thereby ignoring the breaches that occur annually; and second that the trusts are creatures of state law, thereby ignoring the origin and history of the grants. *Papasan v. United States*, 756 F.2d 1087, 1094 (5th Cir. 1985)(P.A. 23). Neither the characterization by the Fifth Circuit or the Attorney General respondents of the school lands grant is accurate. The grant of section sixteen lands to the states to administer in trust for the benefit of the public schools was no mere gift.[4]

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[3] The Attorney General respondents also argue that the actions of the trustees were prudent and that no fraud or waste took place. Aside from the fact that the allegations of the complaint must be taken as true in view of the status of the pleadings, this argument ignores the conversion of the trust corpus mandated by the Mississippi Legislature in 1856 that occurred when the funds from the sale were deposited in the treasury's general fund. 1856 Miss. Laws 141 ch. LVI (J.A. 87). This also ignores the give-away of the reversionary interests in the leased trust lands, mandated in 1854. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86). It also raises factual and legal questions that cannot be determined on the pleadings. Because this case was dismissed on the pleadings under Fed.R.Civ.P. 12(b)(6), the complaint's allegations of fraud and waste must be taken as true. *Hishon v. King & Spaulding*, ___ U.S. ___, 81 L.Ed.2d 59, 65 (1984); *Conley v. Gibson*, 385 U.S. 42, 45-46 (1957).

[4] Presumably, the Attorney General respondents would argue that the school lands trust grant was an obligation and not a "gift" if the issue were the obligation of the United States to provide the land. Of course, the compact was not a gift but rather did impose judicially enforceable obligations. "Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act become a *jus in re* judicial in its nature, and under the compliance and protection of the judicial authorities. . . ." *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 179 (1855).

Despite the wealth of contrary federal authority cited in petitioners Brief On The Merits (Petitioners' Brief at 16-24), the Attorney General respondents contend that Mississippi state officials cannot be held to the duties of trustees of the school lands trust. As sole authority for the proposition, they rely on the following language from *Alabama v. Schmidt:*

> The gift to the State is absolute, although, no doubt, as said in *Cooper v. Roberts*, 'there is a sacred obligation imposed on the public faith.' But that obligation is honorary like the one discussed in *Conley v. Ballinger*, 216 U.S. 84, and even in honor would not be broken by a sale and substitution of a fund, as in that case; a course, we believe, that has not been uncommon among the States.
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> -232 U.S. 168, 174 (1914)(Attorney General Respondents' Brief at 13).

This language in *Schmidt* must be understood in the context of the fact situation presented by that case, and the legal positions adopted by the parties. In *Schmidt*, Alabama was attempting to invalidate a conveyance of specific sixteenth section land it had made to Schmidt's predecessors. There was no question but that Alabama had knowingly and voluntarily made the conveyance for valuable consideration and that Schmidt and her predecessors had possessed the property for a period of over forty years. Brief of Plaintiff in Error at 2, *Alabama v. Schmidt*, 232 U.S. 168 (1914). The legal theory, under which Alabama was attempting to invalidate Schmidt's title, was that Alabama was without power under federal law to have made this bargain with Schmidt's predecessors, and that the conveyance was therefore void.[5] The *Schmidt* Court

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[5] The State of Alabama's position that it could not convey the lands was based on a contention that it did not have title even as trustee,

strongly refuted the notion that states were unable to sell school lands as part of overall trust management. It is not for naught that, in the same sentence characterizing the trust as "honorary", the Court notes that "a sale and substitution of a fund" is the conduct that is approved. *Schmidt* involved no allegations of trust mismanagement and no injury to any trust beneficiaries was implicated. The Court was not construing the trust relationship between the state trustee and the schoolchildren beneficiaries.

The Court in *Alabama v. Schmidt* also described the trust as "honorary" like a trust construed in *Conley v. Ballinger*, 216 U.S. 84 (1909). *Conley* involved an enactment by which Congress authorized the sale of land which was a cemetery for the Wyandotte tribe. The tribe would receive the proceeds of sale to be distributed ratably among the tribe members. *Conley* did *not* involve a breach by the United States of any of its obligations as trustees—fair and reasonable compensation would be received by the tribe for the sale of the land. Brief of Appellees at 4, *Conley v. Ballinger*, 216 U.S. 84 (1909). Conley sought injunctive relief to prevent the sale of the cemetery containing her ancestors. The Court held that the United States was not bound to respect Wyandotte preferences as to whether specific property would be retained or sold.[6]

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and that the federal government retained title to the school lands even after the creation of the trust. Brief of Plaintiff in Error at 9, 15-16, *Alabama v. Schmidt*, 232 U.S. 168 (1914). A similar contention was made by the state in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-303 (1976), in which Arizona contended the trust prohibited conveyance of a leasehold which provided a compensable interest to the lessee in the event of condemnation. While rejecting any such limitation on a state's ability to convey trust property, the *Alamo* Court nonetheless made it clear that the trust was valid and enforceable.

[6] While Congress did require the consent of the various counties in the Chickasaw Cession prior to any sale of the lieu lands by the state, 10 Stat. 6 ch. XXXV (1852) (J.A. 63), this prerequisite was ignored by state officials. 1854 Miss. Laws 348 ch. CCXVII (J.A. 86).

The trust was thus "honorary"—*not* in the sense that there was no enforceable trust or that fair compensation need not be given, but rather—in the sense that the United States had plenary power to keep property or convert it to trust funds at will. 216 U.S. at 90.

Close attendance to the situations presented by both *Conley* and *Schmidt* reveal clearly what the Court meant by "honorary" in this trust context. In both cases, beneficiaries of actual trust obligations—Alabama schoolchildren and the Wyandotte tribe—receive just compensation for the conveyance of the trust property. In public trusts of this "honorary" character, the Court holds that the trustee's duty to retain specific trust property is only "honorary". These cases do not suggest that the trustee's duty to properly manage the trust is anything other than binding and enforceable.

Rather than a "substitution of a fund" to replace trust lands that are sold, Mississippi disposed of the reversionary interest in trust lands for inadequate consideration, converted the proceeds and comingled them with the general funds in the state treasury. 1856 Miss. Laws 141 ch. LVI (J.A. 87). After converting the funds by depositing them in the state treasury, the state officials used a part of the funds for loans to the railroads. 1856 Miss. Laws 141 ch. LVI (J.A. 91). Mississippi thus inverted the congressional policy of the school lands trust: "The interests of the public schools have already been considered paramount to those of railroad companies in grants made to aid in their construction. The one speaks for intellectual, the other for material, development." *Minnesota v. Hitchcock*, 185 U.S. 375, 401 (1901).

Lassen v. Arizona, 385 U.S. 458 (1967), disposes of any doubt about the binding nature and enforceability of the school lands trust. *See also Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-03 (1976). In *Lassen*, the Court held that the binding nature of the trust meant that the

state highway agency could not simply take school trust land for highway purposes without compensating the trust for the value taken by that use. Thus the *Lassen* Court upheld conditions upon the sale of trust property. Mississippi's trust also had conditions on sale. Congress, in authorizing sale of the lieu lands, prohibited any subsequent sale without the consent of the Chickasaw Cession beneficiaries and provided further that all sale proceeds were to be held in trust for those same beneficiaries. 10 Stat. 6 ch. XXXV (1852)(Authorization of Sale of Lieu Lands) (J.A. 63). In selling these lands, Mississippi state officials ignored both these conditions and the duty (imposed by the law of trusts) to maintain and properly manage the funds realized from the sales. Petitioners' Brief at 8. If the Attorney General respondents' theory was correct, and the state were free to dispose of school trust lands without federal restrictions, *Lassen* would necessarily have been decided the other way.[7]

The Mississippi school lands trust is a binding federal obligation arising from the Georgia Compact and the Mississippi Enabling Act that cannot be evaded by the state officials. "The dedication, we repeat, was special and exact. . .; the United States being the grantor of the land,

[7] The fact that *Lassen* was decided under a later, slightly more specific land grant statute is immaterial. "Congress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the states on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance to the same policy did not have one meaning in one grant and a different meaning in another. . . ." *United States v. Morrison*, 240 U.S. 192, 255 (1915). Both the language of the grants and the restrictions placed on the states in the administration of the trusts in Arizona and Mississippi are similar in import. The fact that more specific restrictions (not material here) were imposed on Arizona is the result of the continuing efforts by Congress to make the sort of boondoggle perpetrated by the State of Mississippi in this case more difficult to achieve. But these additional specifications form no basis to question the application of *Lassen* to this case.

could impose conditions on their use. .a . ." *Ervien v. United States*, 251 U.S. 41, 47-48 (1919).

The school lands trust claim arises from the beneficial interest in the school lands trust created by Congress in a series of compacts and statutes. Accordingly, it must be judged under traditional principles of equity. *United States v. Swope*, 16 F.2d 215, 217 (8th Cir. 1926) ("The trust was imposed on [the state] by an act of Congress, but the same equitable rule of contruction applies to both public and private grants."). Under those principles, the land grant statutes created a public trust: "All revenues from the sale or lease of the lands was impressed with a trust in favor of the public schools." *Andrus v. Utah*, 446 U.S. 500, 523-24 (1980). (Powell, J. dissenting). The beneficiaries of that trust are the schoolchildren of the Chickasaw Cession[8]—the petitioners in this Court. Their suit is one in equity to preserve, protect and obtain the benefits of the trust. It is brought pursuant to the traditional right of a trust beneficiary to invoke the jurisdiction of acourt of equity to enforce the beneficial interest in the trust. 4 *Pomeroy's Equity Jurisprudence*, § 1018 at 2, § 1025 at 49 (5th ed. 1941). In addition, Mississippi law delegates to plaintiff school officials responsibilities for local management of the school lands trust. *Miss. Code Ann.* §§ 29-3-1; 29-3-17; 29-3-57; 29-3-59 (Supp. 1985) (J.A. 71-74). Accordingly, like any trustee, they may invoke the jurisdiction of an equity court to determine their obligations under the trust.

[8] The Attorney General argues that the plaintiffs have no standing. (Attorney General Respondents' Brief at 30-35). This argument is hard to understand. Clearly, the school children and their representatives have alleged the requisite Article III standing when they alleged that they continue to receive substantially less school lands trust money than they should but for the illegal actions of the defendants. The fact that the students lack the educational advantage that money can buy—more teachers, newer and better facilities, more books, etc.—establishes the injury-in-fact necessary for standing.

The respondents, who are the trustess, have a continuing obligation to fulfill the terms of the trust. This obligation is breached anew each time the trustees fail to provide the beneficiaries with the proceeds due from that trust. *See* 4 *Pomeroy's Equity Jurisprudence* §§ 1067 at 182-85, 1080 at 229 (5th ed. 1941) (continuing duty of trustee). The fact that this obligation has been breached and the trust violated each year since 1856 is no reason to refuse enforcement of the trust in the future. Not only has there been no repudiation of the obligation by the state or its officials, the obligation—as well as the failure to fulfill it—has continued to be acknowledged up to the present day. One of the respondents, the Secretary of State, acknowledges this continuing obligation in his separate brief. (Secretary of State Respondents' Brief at 3-5). The State of Mississippi acknowledged this continuing obligation by legislative act in 1985. Furthermore, the Secretary of State and the State of Mississippi acknowledged that this continuing obligation is not being fulfilled. Having failed to fulfill this obligation for 130 years, having acknowledged the failure to fulfill the continuing obligation, and having refused to fulfill the continuing obligation it would seem that prospective injunctive relief is not only appropriate, it is mandated.

Further, this equitable claim for the enforcement of the trust is a claim of federal right governed by purely federal standards. Thus, in *Ervien,* this Court rejected New Mexico's argument that a suit to enforce the school lands trust "is no more than an attempt to interfere with the due administration of a trust estate by the trustee, the state. . . ." 251 U.S. at 46-47. The Court made clear that: "We need not extend the argument or multiply considerations." 251 U.S. at 48. "[T]he United States, being the grantor of the lands, could impose conditions on their use. . . ." 251 U.S. at 48. And, "the United States has a continuing interest in the administration of both the lands

and the funds which derive from them" *Lassen,* 38 U.S. at 460.

II. The Eleventh Amendment Does Not Bar Prospective Relief For The Continuing Violations Of The School Lands Trust And The Equal Protection Clause

The court below erred in dismissing those parts of the suit seeking prospective injunctive relief against state officials for the continuing violations of the school lands trust and the equal protection clause. Both the court below and the Attorney General respondents in their brief rely on language from *Pennhurst State School v. Halderman,* 465 U.S. ___, 79 L.Ed.2d 67 (1984), that suits against state official that would operate against the state treasury are barred by the eleventh amendment. *Pennhurst,* 79 L.Ed.2d at 79. But *Pennhurst* dealt with a pendent state-law claim. This case concerns only claims of federal statutory and constitutional law. The trust claims seek to enforce a trust created by acts of Congress; the contracts clause claims and the equal protection clause claims seek to enforce rights secured by the United States Constitution. This suit therefore falls within "the rule permitting suits alleging conduct contrary to 'the supreme authority of the United States. . . .' " *Pennhurst,* 79 L.Ed.2d at 80 (quoting *Ex parte Young,* 209 U.S. at 160). A "federal court may award an injunction that governs the [state] official's future conduct. . . ." 79 L.Ed.2d at 80 (citing *Edelman v. Jordan,* 415 U.S. 651 (1974)).

The Attorney General respondents' reliance on the fact that the state was originally named as a defendant is also misplaced. "[T]he fact that the State should have been dismissed . . . does not mean that [the action] may not stand against other parties who are not immune from suit." *Florida Department of State v. Treasure Salvors,* 458 U.S. 670, 684 (1982); *see Alabama v. Pugh,* 438 U.S. 781, 782-83 (1978). There is only a bar to suit if there is no possible remedy *against any party* that comports with the limitations of the eleventh amendment.

The relief by which the petitioners seek to vindicate these federal rights is purely prospective. (Petitioners' Brief at 34-39). For that reason, this suit is not barred by the eleventh amendment as construed in this Court's cases from *Hans v. Louisiana,* 134 U.S. 1 (1890) to *Atascadero State Hospital v. Scanlon,* 473 U.S. ___, 87 L.Ed.2d 171 (1985). However, it seems on the face of it anomolous to apply modern eleventh amendment jurisprudence to acts of Congress passed in the first half of the nineteenth century. The Congresses which set up the trusts upon which Mississippi's trust was modeled acted *prior* to the ratification of the eleventh amendment. *See Cooper,* 59 U.S. at 177 (Petitioners Brief at 16-17). The Congresses which established the principles that would govern the school lands trusts would necessarily have understood, under then-governing law, that these trusts were enforceable in a court of equity. Congress would not have considered either sovereign immunity or the eleventh amendment a bar to suits to enforce these trusts.

Sovereign immunity would not have been considered a bar for two reasons: (1) under then-prevailing law, either law received from England,[9] or law of the colonial period,[10] sovereign immunity did not bar suits in equity to compel the sovereign to perform its duties; and (2) the compacts that created these trusts were essential pre-conditions of

[9] In England, official action could be compelled by mandamus, which was even available to command the Lords of the Treasury to make payments. Jaffe, *Judicial Control of Administration Action* 211 (1965); *see Ellis v. Earl Grey,* 6 Sim. 214, 223, 58 Eng.Rep. 574, 577 (Ch. 1833) (the Lords of Treasury enjoined to ensure certain fees would be payable only to plaintiff); *Rex v. Barker,* 3 Burr. 1265, 1267, 97 Eng.Rep. 823, 824-25 (1762) (mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.").

[10] In the colonial period, the vast majority of the colonies were subject to suit; often their charters of or constitutions explicitly provided so. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 Colum.L.Rev. 1890, 1896-98 (1983).

a state's sovereignty, irrevocably binding a state to the compacts' terms on entry into the union.[11] It is not logical that a *condition* of sovereignty (such as sovereign immunity) could limit an *irrevocable pre-condition* of sovereignty itself. Nothing in the history of these trusts, the enabling acts for the states, or the eleventh amendment itself suggests such an illogical construction.

Similarly, the eleventh amendment, as understood in the early nineteenth century, would not have been seen as a bar to a suit such as this. In discussing the reach of the eleventh amendment in *Cohen v. Virginia,* 19 U.S. (6 Wheat.) 265 (1821), the Court explicitly held that

> no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting by the instrumentality of its courts, the constitution and laws from active violation.
>
> *Cohens,* 19 U.S. at 407.

In *Cohens,* Chief Justice Marshall explained that the eleventh amendment was not intended "to maintain the sovereignty of a state from the degredation supposed to attend to a compulsory appearance before a tribunal," but rather to protect a state's interest in "consulting its convenience in the adjustment of its debts." *Cohens,* 19 U.S at 407 The Court's eleventh amendment cases of that era make explicit that the amendment did not undercut the supremacy and enforceability of federal law. *See Governor of Georgia v. Madrazo,* 26 U.S. (1 Pet.) 110, 123-24 (1828)(Court stressed that there was no allegation that state had acted in "violation of an act of Congress."); *Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 739 (1824)(suggests

[11] *Cooper,* 59 U.S. at 178; *see Andrus,* 446 U.S. at 523 ("Congress imposed upon the state a binding and perpetual obligation. . . .") (Powell, J. dissenting).

that amendment would have "its full effect" if enforced only to its express terms).

To a nineteenth century Congress, neither sovereign immunity nor the eleventh amendment would have presented any bar to the enforcement of the rights created by the school lands trust. It seems illogical to impose as limits upon Congresses' action the judge-made rules of seventy-five years later as to the scope of the eleventh amendment (*Hans v. Louisiana*, 134 U.S. 1 (1890)) or one-hundred and fifty hears later as to abrogation of the eleventh amendment (*Atascadero State Hospital v. Scanlon*, 473 U.S. ___, 87 L.Ed.2d 171, 180 (1985)). In *County of Oneida v. Oneida Indian Nation*, 470 U.S. ___, 84 L.Ed.2d 169 (1985), this Court considered the possibility that the Non-intercourse Act of 1793 might have abrogated sovereign immunity, even though no express language of abrogation was used. The Court "[a]ssum[ed], without deciding that this reasoning was correct. . . ." *Oneida*, 84 L.Ed.2d at 190. The claims in *Oneida* were held barred, however, because they did not arise under the 1793 act. In the case at bar, the petitioners' claims arise directly from the late 18th and early 19th century acts of Congress creating those rights. The evidence is that Congress would not have understood the eleventh amendment to bar enforcement of the rights it created. Thus it would seem that the abrogation assumed to be present in *Oneida* is in fact present in the case at bar.

This Court, however, need not reach the issue of whether Congress intended abrogation because this suit is permissible under traditional notions of how the eleventh amendment works.[12] This is true because the petitioners seek

[12] The claims stated in the complaint do not run afoul of the eleventh amendment for several reasons. As stated in the text, these claims seek prospective, injunctive relief that is clearly allowed under this Court's eleventh amendment cases. Furthermore, the trust nature of the federal claims obviates any eleventh amendment problems. For the essence of the trust claim is that money representing the corpus of the trust does not belong to the state. As the Fifth Circuit has explained in an analogous context:

> The fund was not the property of the State. . . .It had been entrusted to a state agency only to hold and invest. . . .Under these circumstances the judgment. . . .ha[s] no true impact on the state treasury; the effect of paying over such trust funds for their intended purposes would be an ancillary one at best. Such payments are not prohibited by the Eleventh Amendment.

Schiff v. Williams, 519 F.2d 257, 262 (5th Cir. 1975) (award to improperly discharged student editor from fund composed of student activity fees held by state for support of student newspaper); *cf. Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982) ("since the state officials do not have a colorable claim to possession. . ., they may not invoke the Eleventh Amendment. . . .").

prospective, injunctive relief based upon a continuing breach of the federal statutes which created the trust. While the lower court recognizes that "a federal compact was created and breached over a hundred years ago," it then mischaracterizes the continuing annual breach of the same federal compact as a violation of the state law of trusts, and thereby rationalizes its failure to grant prospective relief. *Papasan*, 756 F.2d at 1094 (P.A. 23). The primary thrust of the complaint is prospective; the naming of the state and the request for compensatory relief were premised on the since-abandoned hope that the state (whose Secretary of State and chief official in charge of the school trust lands support petitioners' suit) might consent to suit.[13] Since consent was not obtained, those claims were abandoned in the briefs submitted to the Fifth Circuit.

[13] The subparagraph seeking compensatory relief is only one section of one paragraph amongst seven requesting relief. It appears in a section of the complaint addressed to the district court "[s]itting as a [c]ourt of [e]quity." (J.A. 23). That section asked the court to use its equitable powers flexibly to formulate appropriate remedies for the violation of the trust. (J.A. 25-26, 29-30).

There must be forms of prospective relief within the confines of the eleventh amendment which are appropriate to this case. As in *Ex Parte Young*, the state trustees could be "enjoined to conform [their] future conduct of that office to the requirement of the Fourteenth Amendment. . ." and federal law. *Edelman v. Jordan*, 415 U.S. 651, 664 (1974). There could be no eleventh amendment problem with an order requiring fair and equal administration of the current trust corpus[14] nor with an order upholding the validity and prospective enforceability of the trust. Or, using *Milliken v. Bradley*, 433 U.S. 267 (1977)(*Milliken II*), as a model, the court could require that the beneficiaries be made whole by the provision of sufficient educational and remedial programs to provide them with the educational benefits they would have had but for the continuing breach of the trust.

The choice between these various forms of permissible relief is one that properly belongs to the district court, exercising its equitable powers to structure appropriate relief in light of local conditions and the equities of the case. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971). The suit must be allowed to proceed as long as some relief may issue without violating the eleventh amendment. The court below erred in prejudging the issue of appropriate relief under the guise of a jurisdictional ruling.

The fact that the state will have to expend funds in connection with such relief does not run afoul of this Court's cases from *Ex parte Young* through *Edelman*, *Milliken II*, and *Pennhurst*. As in *Edelman* and other welfare cases, a prospective order requiring state officials properly

[14] Such an order could be premised either on the equal protection claim or a ruling that the current trust corpus consisting of sixteenth section lands and their proceeds in the Southern, non-Chickasaw Cession part of the state be administered in trust for all the schoolchildren in the state.

to administer a disbursement program in the future necessarily requires the disbursement of funds from the state treasury. 415 U.S. at 667-68. But the Court has distinguished and approved "such a financial impact . . . where a federal court applies *Ex parte Young* to grant prospective declaratory and injunctive relief, as opposed to an order of retroactive payments. . ." 415 U.S. at 666 n.11.

The point is that "[b]oth prospective and retrospective relief implicate eleventh amendment concerns," but that "[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. ___, 88 L.Ed.2d 371, 377 (1985). Thus, the fact that an injunction ultimately results in the payment of money out of the state treasury does not convert the claim to one proscribed by the eleventh amendment. "State officials, in order to shape their official conduct to the mandate of the court's decrees, would . . . have to spend money from the state treasury . . . such an ancillary effect on the state treasury is a permissible and often *inevitable* consequence of the principle announced in *Ex parte Young*," *Edelman*, 415 U.S. at 668 (emphasis added). Such an order is ancillary to upholding the validity of the trust and enforcing the trust. It is not an end in itself, as is an award of damages. A request for monetary relief is "proper to the extent it [seeks] 'payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination. . .' " *Milliken II*, 433 U.S. at 289 (emphasis in original) (quoting *Edelman*, 415 U.S. at 668).

Indeed, if anything, this case is stronger than *Milliken II*. For the monetary relief awarded in *Milliken II* was intended to make whole the victims of a past constitutional violation that presumedly was to cease with the implementation of the other injunctive relief awarded by the court. Here, in contrast, both the violations and the effects of the past breach of the trust will continue indefinitely

unless monetary relief is ordered. The Chickasaw Cession schools will never receive their fair share of the trust that Congress has required for their exclusive benefit. As a result, the children that attend those schools will continue to receive a substandard education. Here, even more than in *Milliken II*, the harm as well as the remedy is prospective. While the shape of that remedy is yet to be determined, the eleventh amendment does not mean that no federal remedy may issue to stop the continuing violation of federal law and the continuing and future harm to the Chickasaw Cession schoolchildren.

CONCLUSION

The Court should reverse the judgment of the court of appeals, and remand the case for appropriate proceedings in the district court.

DATED: This, the 14th day of April, 1986.

Respectfully submitted,

T. H. FREELAND, III
(Counsel of Record)

Of Counsel:
T. H. FREELAND, IV
T. F. WILSON
FREELAND & FREELAND
1013 Jackson Avenue
Post Office Box 269
Oxford, MS 38655
(601)234-3414

Of Counsel:
ORMA R. SMITH, JR.
SMITH, ROSS & TRAPP
508 Waldron street
Post Office Box 191
Corinth, MS 38834
(601) 286-9931

CERTIFICATE OF SERVICE

I, T. H. Freeland, III, counsel of record for petitioners, do hereby certify that I have tnis day mailed, postage pre-paid, three true and correct copies of Reply Brief for Petitioners to:

Honorable R. Lloyd Arnold
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi, 39205

Dick Molpus
Secretary of State of the
State of Mississippi
401 Mississippi Street
Jackson, Mississippi 39205

This, the 14th day of April, 1986

/s/ T. H. Freeland, III
T. H. Freeland, III